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No. 76-1090

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARIANNE COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-26), as modified by its opinion denying rehearing (Pet. App. 29-31), is reported at 545 F. 2d 406.

JURISDICTION

The judgment of the court of appeals (Pet. App. 27-28) was entered on August 6, 1976. A petition for rehearing was denied on January 7, 1977 (Pet. App. 31). The petition for a writ of certiorari was filed on February 5, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an arrest warrant authorizes law enforcement officers to enter the house of a third party, to make

the arrest, where they are certain that the person named in the warrant is in the house.

2. Whether officers, once properly in a house, may quickly examine their surroundings to guard against the possibility that persons elsewhere in the house might endanger their safety.

STATEMENT

Following a jury-waived trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing cocaine with intent to distribute that drug, in violation of 21 U.S.C. 841(a)(1).[1] She was sentenced to four years' imprisonment, to be followed by three years' special parole.

1. In late June 1974 a narcotics organization headed by Richard Cravero imported a large quantity of cocaine and marijuana into the United States by boat. To facilitate this operation, Cravero hired William Orr, an informant, to pilot one of the boats. After the drugs had been imported into this country, Cravero was unable to pay for Orr's services. Orr and Cravero arranged to meet in the early evening hours of July 14, 1974, at a restaurant, to discuss this problem.

Federal agents outside the restaurant observed Orr meet with Cravero, Ronald Chandler and Sharon Willets (S. Tr.

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[1]Petitioner also was charged, together with Richard Cravero, Ronald Chandler, Sharon Willets, Bobby Miller, Phillip Siegal, and others with conspiring to import and possess narcotics. She was found not guilty of the conspiracy. Cravero, Chandler, Willets, Miller and Siegal were convicted. Miller's petition for a writ of certiorari (No. 76-5582) was denied on February 22, 1977. Cravero, Chandler, and Willets also have filed a petition (No. 76-1267); that petition does not present any issue in common with those involved here.

65-66, 213-214, 402-403, 446-447).[2] The agents possessed warrants to arrest both Cravero and Chandler for narcotics crimes that the court of appeals described as of a "heinous nature" (Pet. App. 20). The officers also had information that the two men were heavily armed and had been involved in a murder (S. Tr. 164-165). Their appearance at the restaurant was the first time the agents had been able to locate them since the issuance of the warrants (S. Tr. 204, 466-470, 548, 584, 766-768).

The agents did not attempt to arrest Cravero and Chandler at the restaurant. They wished to avoid compromising Orr's role as an informant and to protect Orr and his family from possible reprisal (S. Tr. 113-114, 616-617, 628-629). The agents watched as Cravero, Chandler, and Willets left the restaurant, got into a car driven by Donald Troise (another person named in an outstanding arrest warrant) (S. Tr. 994)), and drove off (S. Tr. 86-88, 221-226, 404-406, 452-453, 480, 486-487, 498, 599, 909-913, 916-917, 921-922, 931, 933, 942).[3]

The agents followed the car to a Miami motel, where the occupants lingered for several minutes before driving away again, having dropped off one of the original passengers (S. Tr. 86-88, 100-101, 227).[4] The car went to petitioner's house, and its passengers went inside (S. Tr. 105, 487, 494-495, 499,

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[2]"S. Tr." refers to the transcript at the pretrial suppression hearing.

[3]The agents could not identify a fifth person they saw in the car (S. Tr. 486-487, 733).

[4]The car then contained Cravero, Chandler, Willets and an unidentified fourth person. The agents were unable to tell whether any occupant of the car had remained at the motel (S. Tr. 407). Some of the agents conducted an investigation to determine if Troise had remained, but they did not find him there (S. Tr. 914-915); they notified the other agents of this (S. Tr. 940-941).

502-504, 643-644). Shortly after 9:00 p.m. numerous agents surrounded the house.[5]

About four hours later the agents, having concluded that Chandler and Cravero would not soon leave petitioner's house, decided to enter the house and execute the arrest warrants (S. Tr. 120-121). Before the agents decided to make the arrest, they had learned that Cravero had telephoned Orr and indicated that he was aware of Orr's role as an informant (see Pet. App. 12 n. 18).

While other agents surrounded the house, two agents knocked on the door, identified themselves, and announced that they had arrest warrants for persons inside (S. Tr. 126, 410-411, 514-515, 650). After approximately one minute, petitioner opened the door and exclaimed: "Hey, you guys, the cops are here" (S. Tr. 412, 515, 650-653). The agents promptly entered; they found Cravero in the living room and arrested him (S. Tr. 413-414, 418, 516-517, 653). They immediately saw Chandler standing in the doorway of the master bedroom, next to a television set on which there was a pistol (S. Tr. 131, 138, 415-416, 427-430, 522-527, 653-656, 719). They arrested Chandler and seized the gun.

The officer who seized the pistol heard "rustling noises" or the sound of someone "scuffling around" in the adjacent bathroom (S. Tr. 431, 528, 658). Expecting to find Troise, who had a reputation for violence and who was reported to be heavily armed (S. Tr. 164-165, 722, 913, 933), three officers entered the bathroom with weapons drawn (S. Tr. 427, 431, 533, 666, 719-722). They found not Troise but Willets, leaning over the shower stall (S. Tr. 421-426, 534,

[5]The agents saw Phillip Siegal, but no one else, leave petitioner's house (S. Tr. 511-513, 586-587). Siegal drove off in the same car that had been used by the group when they left the restaurant earlier in the evening.

671-672). When Willets stood up, an agent saw a metal tray containing a large quantity of white powder (later determined to be cocaine) on the floor of the shower (S. Tr. 677, 687-688, 720, 724), and he also noticed, on the counter next to the sink, paraphernalia used in the processing of narcotics (S. Tr. 717-718). The officers then looked in the closed portion of the shower stall and in a full-length closet, both places where a man could hide, but did not find Troise or anyone else (S. Tr. 537, 541, 572).

The cocaine and the processing paraphernalia were introduced into evidence at petitioner's trial.

2. The court of appeals initially held that the arrest warrants did not authorize an entry into petitioner's house (Pet. App. 14-18). The court concluded that an entry into a third person's dwelling to make an arrest required a search warrant, based on probable cause to believe that the person to be arrested was within. It explained that an entry into a third party's home without a search warrant "[would] be permissible only if exigent circumstances or some other established exception to the warrant requirement obtains" (Pet. App. 16-17; footnote omitted).

The court held that no exigent circumstances supported the entry into petitioner's house (Pet. App. 13-14 and n. 24). It upheld the introduction of the evidence, however, reasoning that it had been seized as a fruit of the arrests rather than as a fruit of the illegal entry (Pet. App. 18-26). The agents were entitled to arrest Cravero and Chandler, it explained, and the contraband was inadvertently discovered in plain view during a protective sweep of the house for other dangerous persons.

On petition for rehearing, the court of appeals receded from its original analysis and held that "an entry to execute an arrest warrant is an exception to the requirement of a

search warrant to intrude into a home" (Pet. App. 29). The court wrote that the arrest warrant serves the same role as a search warrant by particularizing the search (*id.* at 31 n. 1) and that officers with an arrest warrant may properly enter a residence, even that of a third party, if they have probable cause to believe the suspect will be found inside (*id.* at 30-31). It therefore denied the petition for rehearing.

DISCUSSION

1. There are two important unresolved issues concerning the propriety, under the Fourth Amendment, of entries to make arrests on probable cause. The first is whether a warrant, of any type, is necessary to enter a suspect's own dwelling[6] to arrest him on probable cause to believe that he has committed a felony. The second is whether a search warrant is necessary to enter the dwelling of a third person to arrest a person who is lawfully subject to arrest and who there is probable cause to believe can be found there. See *United States* v. *Santana*, 427 U.S. 38, 43-44 (White, J., concurring), 45 (Marshall, J., dissenting); *United States* v. *Watson*, 423 U.S. 411, 432-433 and n. 7 (Powell, J., concurring), 433 (Stewart, J., concurring). This case presents the second of these questions.

We have argued that neither an arrest warrant nor a search warrant is necessary to enter the dwelling of a suspect to arrest him on probable cause to believe that he has committed a felony.[7] If that argument is correct, or

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[6]We use "dwelling" to mean a private place in which the person resides. It would include a hotel or motel room rented by a transient.

[7]See pages 30-46 of our brief in *United States* v. *Santana*, No. 75-19, October Term, 1975.

if an arrest warrant alone is sufficient, then the evidence seized in petitioner's house could be used at trial against Cravero and Chandler, for they surely could have no greater expectation of privacy or right to be free of arrest in petitioner's house than they would have had in their own. The arrest warrants issued for Cravero and Chandler, moreover, amounted to judicial authorization to deprive them of their liberty, and they would not be entitled to complain that this deprivation was effected in one place rather than another; they had no legitimate expectation of privacy in their surroundings, because they had no legitimate entitlement to remain at liberty. Furthermore, because persons are highly mobile, an arrest warrant need not state the place at which the arrest is to take place—the suspects might move from one place to another even as the warrants are being obtained.

For these and other reasons, it is appropriate to conclude that a person arrested pursuant to an arrest warrant in the dwelling of a third party cannot complain about the seizure of evidence during the entry and arrest. It does not follow from this, however, that the evidence also may be introduced against the third party. Petitioner had a legitimate expectation of privacy in her dwelling; that expectation was not diminished in this case by probable cause to arrest her, and there was no prior judicial determination that it was proper to search petitioner's house for Cravero and Chandler.

The courts of appeals are in conflict on the question whether an arrest warrant is sufficient to authorize officers to enter the dwellings of third parties to look for the suspect named in the warrant. Some courts of appeals—emphasizing historical practices, the transience of persons who are not at home, the fact that the arrest warrant already has particularized the search, and the fact that a search for

persons is not as intrusive as a search for chattels—have held that evidence found in an entry pursuant to an arrest warrant may be introduced against the third party whose home has been entered.[8] The Third Circuit has disagreed, and it has required either a search warrant or exigent circumstances as a precondition to the entry of a dwelling of a third party.[9] Still other courts do not appear to distinguish between entries into the suspect's dwelling and entries into a third party's dwelling; many of these courts appear to require a search warrant for any arrest entry.[10]

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[8]In addition to the instant case, see *United States* v. *McKinney*, 379 F. 2d 259, 262-263 (C.A. 6) (issuance of an arrest warrant is an "exceptional circumstance" authorizing search, in light of the mobility of the suspect), and *United States* v. *James*, 528 F. 2d 999, 1017 (C.A. 5). See also *United States* v. *Brown*, 467 F. 2d 419 (C.A.D.C.) (announcing a general rule that an arrest warrant authorizes entry anywhere that the officers have probable cause to believe that the suspect may be found, and upholding introduction of evidence against the person named in the warrant). An arrest warrant authorizes the apprehension of the suspect "at any place within the jurisdiction of the United States" (Fed. R. Crim. P. 4(d)(2)), and these courts hold that this authorization is constitutionally adequate.

[9]*Government of the Virgin Islands* v. *Gereau*, 502 F. 2d 914, 928-930 (C.A. 3), certiorari denied, 420 U.S. 909 (admitting evidence in light of exigent circumstances); *Fisher* v. *Volz*, 496 F. 2d 333, 338-342 (C.A. 3) (*dictum*).

Petitioner contends (Pet. 19-20) that *Rice* v. *Wolff*, 513 F. 2d 1280, 1292 (C.A. 8), reversed on other grounds *sub nom. Stone* v. *Powell*, No. 74-1222, decided July 6, 1976, also requires a search warrant or exigent circumstances as a condition to an arrest entry. This is incorrect. *Rice* held only that officers executing an arrest warrant on the premises of a third party must at least have probable cause to believe that the suspect is there; the court explicitly reserved the question whether a search warrant is necessary. See also *Lankford* v. *Gelston*, 364 F. 2d 197, 202-203 and n. 6 (C.A. 4) (*en banc*) (reserving question).

[10]See *Vance* v. *North Carolina*, 432 F. 2d 984 (C.A. 4); *United States* v. *Shye*, 492 F. 2d 886 (C.A. 6); *Salvador* v. *United States*, 505 F. 2d 1348 (C.A. 8). All of these courts rely upon *Dorman* v. *United States*, 435 F.

The question whether officers should obtain a search warrant, in addition to an arrest warrant, before entering a place other than the residence of the suspect is important to the administration of the criminal justice system. Officers should know what is expected of them in this regard, so that evidence of crime is not needlessly suppressed. The question has never received the attention of this Court. We therefore believe that the Court should grant review here. The court of appeals held that the entry of petitioner's house was not required by exigent circumstances (Pet. App. 13-14 and n. 24)[11] and was not a pretextual entry to gain an opportunity

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2d 385 (C.A. D.C.) (*en banc*), for the proposition that a warrant or exigent circumstances ordinarily are required to enter a private place to make an arrest. Neither *Dorman* nor the cases following it distinguish between arrest and search warrants or between entries into the suspect's house and the house of a third party. But each of the courts following *Dorman*, including the District of Columbia Circuit, has made such a distinction in another case. See notes 8 and 9, *supra*. See also *United States* v. *Johnson*, C.A. D.C., No. 73-2221, decided January 12, 1977 (*en banc*), petition for a writ of certiorari pending, No. 76-6366 (officers may enter without a warrant to arrest persons seen inside, in plain view, committing a crime).

On the other hand, at least two courts of appeals have indicated that probable cause alone ordinarily is sufficient to support an arrest entry. See *United States* v. *Fernandez*, 480 F. 2d 726, 740 n. 20 (C.A. 2); *United States ex rel. Wright* v. *Woods*, 432 F. 2d 1143 (C.A. 7). The American Law Institute also does not distinguish between arrests on the suspect's premises and arrests in some other place. Its proposed rule would allow arrests in any place, on probable cause, without a warrant. The Institute would, however, require an arrest warrant or exigent circumstances for a nighttime arrest. ALI, *A Model Code of Pre-Arraignment Procedure* §120.6 and pp. 306-314 (1975).

[11]The prosecution argued in the court of appeals that the entry was justified by exigent circumstances. This argument was supported by the holdings of a number of courts, following *Dorman* v. *United States*, *supra*, that create a balancing test considering a large number of factors that might justify a warrantless arrest entry. Some of these factors, including the seriousness of the crime, the fact that the suspects were armed, and so on, indicated the appropriateness of a prompt arrest in this case. The courts of appeals have held that a combination of a

to search the house (*id.* at 11-12 and nn. 17-19). This case therefore presents the question clearly, and we see no reason for the Court to postpone addressing it.

2. If the agents were properly in petitioner's house to arrest Cravero and Chandler, then they were entitled to glance into the bathroom to ensure their personal safety; the contraband found in plain view in those circumstances could lawfully be seized.[12] The agents' brief inspection was justified by ordinary principles of exigent circumstances. The agents had converged near the bathroom to arrest Chandler, seized a gun, and heard noises in the bathroom that might well have been caused by another armed person. Their decision to open the bathroom door was justified not only by what they had seen and heard but also because they suspected that Troise, whom they had a warrant to arrest and who was known to be armed and dangerous, was in the house. The officers saw Troise earlier in the car and had not since located him; they were entitled to take reasonable steps both to find him in order to arrest him and to protect themselves from him. See *Adams* v. *Williams*, 407 U.S. 143, 146; *Warden* v. *Hayden*, 387 U.S. 294, 299. The agents also knew that persons in addition to Cravero and Chandler were in the house—if not Troise, then Willets or others—and these persons constituted a possible danger against which the officers were entitled to protect themselves.

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number of these factors amounts to "exigent circumstances" justifying prompt entry. We do not make an exigent circumstances argument here, however, because one factor strongly indicates the absence of a need for haste: the agents had surrounded petitioner's house, waited patiently for more than four hours, and decided to enter only when it became clear that nothing significant was happening and that Cravero and Chandler were not likely to emerge. This consideration seems to be the antithesis of exigency.

[12] *Harris* v. *United States*, 390 U.S. 234, 236.

The court of appeals held that the inspection of the bathroom was justified as a "prospective sweep" by officers entitled to be within the house (Pet. App. 19-21). Petitioner contends (Pet. 16-19) that this justification is insufficient. But whether or not the officers would have been justified in conducting a "protective sweep" in the absence of reason to believe that there were persons inside the bathroom, they were entitled to proceed as they did here in light of their reasonable suspicion that someone was in the bathroom and might pose a danger to them. The Court therefore need not consider in this case whether, in general, law enforcement officers may quickly glance into other rooms of a house in which they have made an arrest in the absence of specific and articulable reasons to believe that they may be in danger.[13]

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[13] There is conflict among the circuits on this question. Compare *United States* v. *Smith*, 515 F. 2d 1028 (C.A. 5), certiorari denied, 424 U.S. 917, and *United States* v. *Blake*, 484 F. 2d 50 (C.A. 8), certiorari denied, 417 U.S. 949, which hold that such inspections are permitted, with *United States* v. *Cooks*, 493 F. 2d 668 (C.A. 7), certiorari denied, 420 U.S. 996, and *United States* v. *Rodriguez*, 532 F. 2d 834 (C.A. 2) (by implication), which conclude that they are not. Some courts of appeals are internally divided on the question. Compare *United States* v. *Carter*, 522 F. 2d 666 (C.A. D.C.) (protective sweeps are impermissible), with *United States* v. *Miller*, 449 F. 2d 974, 977 (C.A. D.C.) (protective sweeps are a reasonable precaution); compare *United States* v. *Basurto*, 497 F. 2d 781, 787-790 (C.A. 9) (impermissible), with *United States* v. *Hobson*, 519 F. 2d 765, 776 (C.A. 9), certiorari denied, 423 U.S. 931 (permissible). We believe that the propriety of protective sweeps is an important question that should be addressed in an appropriate case. The present case, however, does not squarely present the question that has divided the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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